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Nos. 99-1864 and 99-1865

IN THE

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

STATE APPELLANTS' REPLY BRIEF

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INTRODUCTION AND SUMMARY

A single theme emerges from appellees' brief in response, and it is one we wholeheartedly endorse: the district court's finding that the North Carolina General Assembly was motivated predominantly by race in the design of District 12 is not supported by the record facts on which the district court relied. Our opening brief detailed the reasons why each of the record cites identified by the court in its analysis of the district demographics failed to support an inference of predominant racial motive. Not once in their brief do appellees attempt to rehabilitate the court's own citations, and the record evidence appellees do cite to support the court's analysis of the demographics was *not*, in fact, relied upon by the district court. Appellees' implicit concession that the evidence on which the court actually relied failed to support its findings should be enough in and of itself to warrant reversal; evidence the court did not rely on ought not be the basis for affirmance, since we cannot know whether the district court itself thought that such evidence supported its findings. *See Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 420-21 (1943) (refusing to consider "facts which might have been considered [by the district court], but which are nowhere referred to in the opinions or findings below"). In any event, as we elaborate in this brief, the evidence on which appellees now choose to rely provides no more support than that on which the court below relied.

Appellees spend most of the first part of their brief proving nothing more than the predicate for the case, *viz.*, that the "towns and counties" that make up District 12 appear to be divided along racial lines. That is not disputed here, but it also is not disputed that those same towns and counties *also* appear to be divided along political lines: the heavily Democratic precincts are in, and less Democratic precincts are out. In the teeth of that evidence, the district court found that the statistical evidence "utterly failed" to support a political

explanation for the district lines. J.S. 26a. But even appellees cannot bring themselves to defend *that* finding – contrary to the district court, appellees argue only that the lines correspond "more precisely" to racial than to political demographics.

On its face evidence that district lines merely correspond "more precisely" to racial than political demographics is hardly the kind of strong showing needed to justify a finding of racial predominance in the context of electoral districting. It is also wrong. Every heavily African-American precinct in the district is *more* Democratic than any "white" alternative outside the district, and, more generally, almost every precinct just inside the border of the district is more Democratic than its neighbors just outside the border. The district lines, in other words, are wholly consistent with a desire to maximize Democratic representation in the District.

To try to prove otherwise, appellees are forced to argue on the one hand that the General Assembly made the district *too* Democratic to have been truly motivated predominantly by politics, and on the other hand that the Assembly did not make the district Democratic *enough* to have been truly motivated predominantly by politics. As it happens, appellees are wrong on both counts, but there is a deeper point: under appellees' "heads-I-win/tails-you-lose" model for proving discrimination in electoral districting, no State legislature is safe from a finding of race discrimination when it tries to draw a partisan-based district anywhere race and political behavior are closely aligned. Appellees' argument confirms the danger of freewheeling inquiries into legislative motivation in this context in particular.

Lacking support in the statistical evidence, appellees' attempt to prove a predominant racial motivation boils down to three pieces of "direct" evidence of legislative intent. But this evidence in fact sheds only the weakest *indirect* light on the motives of the General Assembly that enacted the 1997

statute, unlike the truly direct evidence of State motive in this Court's previous *Shaw*-type cases.

Finally, appellees do not offer any truly substantive response to our showing that their claims here are barred by routine application of the principles of claim preclusion.

ARGUMENT

I. THE SHAPE AND COMPACTNESS OF DISTRICT 12 ONLY RAISES THE QUESTION PRESENTED

Appellees begin their defense of the district court's findings with a lengthy discussion of the District 12's compliance with traditional districting criteria, such as compactness, political subdivisions, and communities of interest. Appellees' Br. at 14-19, 23-25. But it is not disputed that traditional districting criteria alone do not fully explain the shape of the district.[1] The question is whether the other factors explaining the district lines were predominantly racial or political. "The Constitution does not mandate regularity of district shape," *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality op.), and a "State may draw irregular district lines in order to allocate seats proportionately to major political parties," *id.* at 964-65 (citing *Gaffney v. Cummings*, 412 U.S. 735, 751-54 & 752 n.18 (1973)). For those reasons, "the neglect of traditional districting criteria is merely necessary [to invoke strict scrutiny], not sufficient." *Id.* at 962. What the plaintiffs must prove is that those criteria were subordinated *to race*, *id.*, and *not* to the "legitimate state goal" of "incumbency protection," *id.* at 964; *see id.* at 979.[2]

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[1] Appellees cannot contest, however, the significant improvements in the appearance of the district over its 1992 counterpart, and the record is undisputed that the drafters tried wherever possible not to depart from traditional principles: shortening and widening the district, not splitting precincts and recognizing communities of interest.

[2] Appellees quote two floor statements of Senator Cooper suggesting that the 1997 plan was "not an incumbent protection plan." Appellees'

II. APPELLEES' STATISTICAL EVIDENCE DOES NOT CALL INTO QUESTION THE POLITICAL EXPLANATION FOR THE DISTRICT 12 LINES

Moving past the departures from traditional districting criteria and on to the possible explanations for those departures – the question in this case – appellees, like the district court, place the bulk of their emphasis on a statistical analysis of the district's lines. From the very outset, however, appellees have a fundamental disagreement with the district court's analysis. The district court found that the political explanation, as a statistical matter, "utterly failed" to explain the shape of the district, J.S. at 26a, and that splits in the counties and towns that make up District 12 "*invariably* occur along racial, rather than political, lines," J.S. at 26a (emphasis added). Appellees, by contrast, readily acknowledge that "some correlation exists between party and the boundaries of the Twelfth District," Appellees Br. at 21, and argue only that the district lines "more precisely correlate" with race than with politics. Appellees' Br. at 18; *see id.* at 21, 22, 23.

The difference is more than semantic. The district court implicitly recognized that, in view of this Court's admonition that courts must exercise "extraordinary caution" before concluding that a majority of a State legislature was motivated predominantly by race in the design of a particular district, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), appellees must do more than show that race is a slightly better – "more precise" – statistical explanation of the district lines than incumbency protection. To allow a factfinder to infer racial

Br. at 43 (quoting J.A. 398, 477). Appellees' quotations are misleading: as their full context reveals, Senator Cooper is merely objecting to the *label*. The very next sentence in one of his statements shows that the distinction is largely semantic: "This is a plan that attempts to preserve the partisan nature of each of the twelve districts as they now exist." J.A. 477.

predominance when the statistical evidence is in near equipoise would create a very high risk of error, especially where, as here, there is an extremely strong pattern of Democratic voting behavior among African-Americans. To avoid that risk in these kind of circumstances, plaintiffs seeking to prove legislative motivation primarily on the basis of demographic statistics should be required to prove that incumbency protection statistically *fails* as an explanation of lines that otherwise seem to track racial populations.[3]

The Court need not resolve this question here, however, for appellees' statistical evidence did not even succeed in the lesser showing that race was a "more precise" explanation for the district lines. To begin with, we showed in our opening brief that none of the statistical evidence actually relied upon by the district court supported its conclusion of racial predominance. State Br. at 25-33. Remarkably, appellees make no effort to show otherwise. Ignoring the evidence on

[3] Appellees mischaracterize our discussion of their burden as requiring proof "that race was the only motive and not merely the predominant motive." Appellees' Br. at 11 n.12. Our point is more modest, but not unimportant: where, as here, plaintiffs seek to prove discrimination in part through *indirect* evidence – such as demographic statistics – that evidence must do more than establish the *possibility* of a predominant racial motive. The statistical evidence must actually *disprove* the possibility that the asserted reason was the true predominant reason. *See, e.g.*, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 470 (1981) (the "asserted reason for the enactment of a statute may be rejected, if it *could not have been* a goal of the legislation" (emphasis added; internal quotation marks omitted)). Only then is the factfinder entitled (though still not necessarily compelled) to decide that the other proffered motive (*i.e.*, race) was the true predominant motive. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2108 (2000). If, as is true here, the statistical evidence does not even call into question the political explanation, that evidence cannot be relevant to the question of which of the two statistically possible explanations is the real one. A plaintiff may still try to prove that race was the predominant motive through direct evidence, but that evidence then must be sufficient in and of itself to justify such a finding.

which the court did rely, appellees instead point to maps, charts, and expert testimony on which the district court did *not* rely, and even to theories of motive never presented to nor considered by the district court in reaching its conclusions. *See* Appellees' Br. at 22-23, 26-27, 29-30.

These efforts at avoidance are unavailing, for two reasons. First, because the court itself did not discuss or even cite the evidence on which appellees rely, we cannot know whether the court itself believed that that evidence actually supported its findings. Indeed, it is possible that the court's refusal to rely on the evidence discussed in appellees' brief reflects its own implicit conclusion that the evidence does *not* support its findings.

Second, and in any event, the statistical evidence to which appellees advert on appeal suffers from precisely the same flaws as the evidence actually relied upon by the district court.

1. Appellees begin by citing – without discussing – a clutch of exhibits, charts, maps, and testimony, all of which, we are told, show that race explains the district better than politics. Appellees' Br. at 22-23. But upon closer scrutiny, all of these items show only one thing, in different ways: heavily African-American precincts are almost always assigned to District 12, whereas strongly Democratic "white" precincts are *not* always assigned to the district. That is perfectly true, but also beside the point, for a simple reason discussed at length in our opening brief, but ignored by appellees: it is an undisputed fact that every heavily African-American precinct inside District 12 is *more reliably* Democratic than the "white" precincts outside the District. J.A. 140, 156. Appellees do not even try to point to a single precinct that could have displaced a heavily African-American precinct in District 12 with a predominantly white *but equally or more Democratic* precinct. And the precincts just inside the border – without regard to racial demographics –

are also consistently more Democratic than those outside the border. *See* J.A. 490, 491, 492.[4] As the *Bush* plurality explained, "looking at totals, rather than at the difference between areas just inside and just outside the district lines, is misleading." *Bush*, 517 U.S. at 972 n.*. That is because evidence focusing on border precincts often better proves the predominance of race by showing that district lines were "finely drawn to maximize the minority composition of the district." *Id.* In this case, however, the border precinct evidence confirms that the lines were finely drawn to maximize the *Democratic* composition of the district.[5]

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[4] There are a few isolated exceptions, but only where the less Democratic precinct had to be included over the alternative for reasons of population equity, shape, or the interests of incumbents in adjacent districts. J.A. 613-14, 622, 625; J.S. 207a-209a. What is more, there are no more such "divergences" in voting behavior comparisons than when the racial populations of border precincts are compared. J.A. 247, 568-69; J.A. 123 (Weber testimony). That is to say, the precincts just inside the border are more Democratic than those just outside about as often as the precincts just inside the border are more African-American than those just outside – confirming that race cannot be shown statistically to predominate in the drawing of the district lines.

[5] The comparison between maps showing racial demographics and those showing voting results, cited at length at Appellees Br. at 23, exemplifies the failure of the evidence on which appellees rely. If one ignores the actual Democratic voting behavior of the precincts assigned into and outside the district, the district lines might appear to track racial population more closely than voting behavior in certain places, because the voting behavior maps show several areas outside the district with strong Democratic voting performances. What the maps fail to reveal is that the precincts inside the border in these areas are almost always more strongly Democratic than those outside, with certain fully explainable exceptions, *see supra* note 4.

Similarly, while appellees contend that a chart of precinct assignments in the split counties reveals "a startling contrast between assignment correlated to race and correlated to the four measures of party affiliation," Appellees Br. at 22 (citing J.A. 515), that chart, in fact, reveals nothing of the sort. It compares the assignment of precincts that are more than 40% African-American (which are almost always assigned to Dis-

2. Appellees, like the district court, ultimately recognize that statistical evidence regarding the exclusion of some "white" Democratic precincts cannot alone carry the day in the face of undisputed evidence that not one of those precincts was as Democratic as the "black" precincts that were included. Thus, appellees, like the district court, are forced to argue that, to protect incumbent Representative Mel Watt, the General Assembly did not actually *need* to include as many reliably Democratic precincts as it did; *ergo*, they reason, the Assembly must have been motivated by race and not incumbency protection. Appellees' Br. at 26 ("the explanation that the district was constructed for a Democrat to win is probably inaccurate if the district is 'safer' than necessary for any Democrat to win"). That reasoning is flawed in general and in every particular.

To begin with, the argument that District 12 is "too safe" is, in truth, not a statistical argument at all. It reflects a normative judgment in respect to the number of reliable Democratic voters necessary to make a given district appropriately "safe." And while appellees and their expert witness are quick to opine as to what *they* think makes a district safe enough, they do not even attempt to point to any general criteria lower courts can use to evaluate, and second-guess, a sovereign State's determination as to the appropriate number of partisan voters necessary to establish a safe district.

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trict 12), on the one hand, with precincts that are more than 40% Democratic (which are only assigned to District 12 about half the time), on the other. That comparison says nothing about the State's motivation, however, given that those African-American precincts are also *much more* Democratic than others. What is more, the chart also shows that the vast majority of precincts in the split counties are more than 40% Democratic; obviously not *all* of those could be assigned to District 12, but in fact more than half were. By contrast, less than 20% of the precincts are more than 40% black, and the fact that virtually all of them are assigned to District 12 is explained entirely by their high proportion of Democratic voters.

In this case, appellees point only to other plans that, they say, would *also* have been "safe" for a Democrat. Appellees' Br. at 26. Once again, they rely exclusively on evidence on which the district court did not rely: "the 1998 plan and draft plans dated as far back as 1995." Appellees' Br. at 26. The district court cited none of those plans in support of its findings.[6] More important, appellees make *no* effort to demonstrate that those alternative districts were sufficiently safe to protect the District 12 incumbent. The district court's findings were expressly predicated on appellees' expert's opinion that 60% single-party representation was the "optimum" level for making a district "safe," but appellees do not even try to respond to the fact that District 12 was just three percentage points above that figure, and that two other, Republican districts were *also* above the 60% figure. State Br. at 27.

Tacitly acknowledging the failure of evidence actually cited by the district court, appellees again point to entirely different evidence, and labor to produce a wholly new explanation for the assignment of African-American precincts to District 12. As appellees now see things, the State was attempting to maximize the number of African-American voters likely to vote in a Democratic *primary*, which (appellees say) would essentially guarantee an African-American Democratic candidate, who could then be expected to prevail in a general election in the heavily Democratic district. There are at least two problems with this theory. First, it has nothing whatever to do with the district court's findings of racial predominance, which did not turn in any respect on (or even mention) the racial demographics of primary voters. Appellees did not urge this theory before the district court, and the district court did not perform, *sua sponte*, the complicated

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[6] Appellees' argument that the 1998 plan was a viable, non-racially motivated alternative rings especially hollow, given that they themselves challenged the 1998 plan, too, as an unconstitutional racial gerrymander.

calculations on which appellees' theory depends. Appellees Br. at 26-27 & n.24. Second, even if the district court *had* considered primary voter racial demographics in making its findings, there is not one shred of evidence in the record that *the State* considered such information in designing District 12, much less any hint that the State acted on the basis of such calculations.

3. Having failed to justify the court's inference of a predominant racial motive on the ground that District 12 was *too* Democratic for partisanship to explain the district lines, appellees immediately turn 180 degrees and argue that the statistics *also* show, to the precise contrary, that the district is *not Democratic enough* for politics to explain the district lines. Appellees' Br. at 29-31. Putting to one side for the moment the merits of their discussion on the latter point, it must be noted up front that, if countenanced here, this extraordinary method of proof will put State legislatures in a virtually inescapable box any time they try to maximize partisan representation where race and partisan voting patterns correlate closely. When a district is slightly more partisan than it "should" be if partisanship explains the district, the State risks losing a challenge to the district; but if the State tries to avoid that risk by making the district less partisan, it risks going slightly too far, and then losing a challenge because the district is not partisan enough. It is hardly "sensitive to the complex interplay of forces that enter a legislature's redistricting calculus," *Bush*, 515 U.S. at 915-16, to subject States' efforts to redraw district lines to that sort of litigation whipsaw.

Fortunately, in this case at least, appellees' attempt to prove that a different, more Democratic district could have been drawn, Appellees' Br. at 30 & n.25, fails on its own terms.[7] On appeal these efforts are based primarily on maps

[7] Contrary to appellees' assertion, nobody contends that plaintiffs in all *Shaw* cases "must show how to construct a more politically gerrymandered district." Appellees' Br. at 29. In *this Shaw* case, however, it is the plaintiffs who have sought to prove that the State's asserted political motive was pretext by showing that if politics was the true motive, different district lines would have been drawn.

appended to their brief that "show some precincts outside the district which voted for the Democratic candidate in all three elections . . . and some precincts inside the district which vote Republican in the same group of elections." *Id.* at 30. These maps, appellees contend, "make clear that a swap could occur," *id.* – *i.e.*, the precincts that voted Republican could have been removed and replaced with precincts with similar populations that voted Democratic, thus making the district more Democratic. The fact that the General Assembly did not make these choices, appellees argue, justifies the district court's conclusion that race must have been the predominant motive. Appellees are wrong.

First, appellees here – as almost everywhere else in their brief – rely exclusively on evidence the district court did *not* rely on in making its findings. The only things the court *did* rely on – what the court in fact said was "[o]f particular note" in respect to the State's motivation, J.S. 26a – were Dr. Weber's suggestion that a single split precinct (Precinct 77) could have been kept whole, and that a few Mecklenburg precincts could have been shifted from District 12 into District 8. *See* State Br. at 30-33.[8] Although the court explicitly identified these facts as especially important to its finding of a predominant racial motivation, appellees do not contest the showing in our opening brief that Dr. Weber's suggestions were not realistic and workable alternatives. *Id.*

Second, not only did the district court *not* rely on the alternatives appellees now propose; it *could not* have relied on

[8] In fact, not even Dr. Weber argued that his proposed alterations to the district lines would have made the district more Democratic. To the contrary, he argued that it would be less Democratic, but more compact. *See* State Br. at 31-32 (discussing Weber's alternatives).

those alternatives because neither the maps, nor their underlying data, were presented to the district court.

Third, in arguing for the first time on this appeal that these alternatives establish proof of the State's predominant racial motive, appellees make no effort to defend or justify the alternative proposals in terms of the range of geographic and political factors the State would have had to consider in deciding whether the lines appellees now propose would have satisfied all of the State's many needs in redistricting. A court, however, must consider "whether race predominated in the redistricters' actions *in light of what they had to work with*." *Bush*, 517 U.S. at 972 n.* (emphasis in original). It is precisely such evidence of context, for example, that refuted the Weber alternatives on which the district court relied and which appellees have chosen not to defend. But because appellees did not present these other alternative possibilities below, the record is devoid of evidence as to all the various factors the General Assembly would have "had to work with" in respect to the lines appellees now suggest. Such lines therefore can have no weight at all in determining, on appeal, whether the district court's finding of racial predominance is supportable.[9]

Finally, then, appellees are reduced to suggesting that the State should have extended the district an additional twenty miles to either "Burlington or Gastonia in a manner not unlike the 1992 Twelfth District." Appellees Br. at 30. Appellees argue, in other words, that the General Assembly's decision not to draw a district that looked *more* like the district invalidated in *Shaw* itself proves that the Assembly must have been motivated predominantly by race in drawing *this* much more compact, less minority district. This argument cannot be taken seriously, except insofar as it exposes the logically absurd limit of appellees' efforts to prove racial predominance by casting about for possible alternative district lines that *could* have been drawn to create a Democratic district. What these efforts principally show is that a mathematically near-infinite number of hypothetical alternative lines could be drawn to fulfill any one stated goal. Most States, however, do not redistrict in the realm of the mathematically abstract. They are, this Court has recognized, constrained by a wide variety of considerations that must be taken into account at every potential turn in the district lines, and this Court has emphasized that, contrary to the theory of appellees' case here and to the findings of the district court, courts must give substantial deference to any State's efforts to balance all those considerations.

[9] Lest we leave the mistaken impression that appellees' proposals likely would have been shown to be workable, we note that appellees' primary alternative proposal – to delete the High Point precincts, Appellees' Br. at 30 n.25 – was not viable, for it would have defeated the State's goal of improving the shape of the district in comparison to its 1992 counterpart. The map appended to this brief reflects appellees' proposed alternative; as that map shows, their proposal would have left the district held together by a narrow thread, a feature of the 1992 plan the State consciously sought to avoid.

III. THE "DIRECT" EVIDENCE DOES NOT SUPPORT THE COURT'S FINDINGS

As discussed above, *supra* note 3, where the indirect, statistical evidence fails to rebut the State's assertion that it was predominantly motivated by legitimate, nondiscriminatory considerations, the direct evidence must be sufficient in and of itself to establish that such considerations were *not* predominant and that race was. In cases like *Bush v. Vera*, *Miller v. Johnson*, and *Shaw v. Hunt*, such proof was clear: the State in each case explicitly conceded that the district at issue was drawn to maximize minority voting power and/or to satisfy the Justice Department's demand for an additional majority-minority district. *See* State Br. at 19-20 (discussing cases). Appellees cannot – and do not – deny that that the evidence of legislative motive in this case does not even be-

gin to compare with the evidence in this Court's other *Shaw*-type cases.

Unlike the concessions in earlier cases, none of the "direct" evidence cited by appellees here actually says anything *direct* about the motives of the General Assembly members who voted for the statute.[10] At the very most, the e-mail from Gerry Cohen to Senator Cooper, and Senator Cooper's two individual floor comments, provide only *indirect* evidence as to what motivated the lawmakers who actually enacted the 1997 redistricting statute. The proper question, then, is whether the few, individual statements on which the district court relied for its broad inference of legislative motive in respect to District 12's lines are, of themselves, sufficient to satisfy the "demanding" showing in respect to *legislative* motivation required to prove a *Shaw* claim. *Miller*, 515 U.S. at 928 (O'Connor, J., concurring).

1. Turning first to the Cohen e-mail, appellees argue that this evidence proves the General Assembly's motives because it is a "view behind the scenes" of the redistricting process. Appellees' Br. at 34. But the e-mail was sent only to two legislators; there is no evidence that any others ever saw the e-mail. Appellees nevertheless contend that the e-mail reflects a "snapshot view of a *Miller* violation in pro[gr]ess," *id.* at 35, because it proves that a "significant

[10] *See United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *accord Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 216 (1983); *cf. Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring and dissenting) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . . and this Court has a long tradition of refraining from such inquiries."). As appellees themselves put it, "the ultimate question is still the legislative intent, and not the subjective intent of Senator Cooper." Appellees' Br. at 39.

number of voters" were moved into District 12 on the basis of their race, *id.* The Cohen e-mail proves no such thing. First, appellees rest their contention on the misleading statement that "the entire e-mail is primarily a discussion of race and racial percentages for the First as well as the Twelfth District." Appellees' Br. at 35. In fact, the e-mail – the entirety of which appears at J.A. 369 – discusses District 1 almost exclusively. And the e-mail does indeed discuss precise racial percentages in respect to District 1, because the State *was* trying to establish a minority-majority in that district, as the State has acknowledged all along. *See* J.S. 31a-35a (district court upholding predominant use of race in design of District 1 to satisfy V.R.A. § 2). It is only after the long District 1 discussion that Cohen adds a single oblique reference to moving the Greensboro black community into District 12.

Second, on its face that oblique sentence only *describes* some of the voters shifted by a change in the new draft plan – it does *not* say those voters were moved into the district *because of* their race. Moving those voters also served the State's legitimate and consistently applied goals of preventing a three-way split of Guilford County, and shifting a large block of Democrats into District 12 and out of District 6 (which was occupied by a Republican). To conclude from the e-mail that race predominated over these other goals in the drawing of the District 12 lines, one has to pile inference on top of inference: first, that Cohen is not just describing the voters moved into District 12, but also identifying his understanding of the reason they were moved; then, that the overall General Assembly had the same reason in mind when it enacted the statute; and even then, that the race-related reason was not just one of the General Assembly's motives, but the Assembly's *predominant* motive. Even assuming the e-mail suggests something about the motives of some of the participants in the redistricting process, it is a wildly distant cry from the official State concessions of racial motive on

which this Court was able to base inferences of predominant legislative motive in other *Shaw* cases. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("stray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria").

2. Senator Cooper's observation (prior to this Court's decision in *Lawyer*) that because District 12 is not majority-minority, "it is my opinion and the opinion of many lawyers that the test outlined in *Shaw v. Hunt*, will not even be triggered because it is not a majority-minority district," J.A. 475, provides even less support for an inference that race predominated the drawing of the district lines. According to appellees, "[i]f there were no racial motive driving the formation of the Twelfth District, there would be no need to be concerned about 'triggering the test of *Shaw*.'" *Id.* at 39. Appellees are quite wrong: the entire point of Cooper's statement was to promote passage of the plan to senators who were concerned that, among other things, the plan might provoke yet another costly constitutional challenge from counsel for appellees. And there is not even a whisper of record evidence that anybody involved in drafting the plan believed there to be a "target" of crafting a district with just under 50% minority population. *See* J.A. 195, 211-12, 220-21, 228-29, 236-38, 602, 621, 645-47.[11]

[11] The statements of Representative McMahan discussed in Appellees Br. at 38-39 were, yet again, not relied upon by the district court. If anything, however, they only confirm that race was the motive that was readily compromised in the design of District 12 in favor of incumbency considerations. *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (race is predominant when, in the presence of other motives, it is the one criterion that "could not be compromised"). In the very passages appellees cite, J.A. 455, 471, Representative McMahan is anticipating and responding to questions from members who might be *objecting* to the Plan on the ground District 12 does not have *enough* African-American residents. Representative McMahan tries to assuage such concerns by agreeing that

3. Finally, whatever Senator Cooper actually meant by his rather obscure statement on the floor that the 1997 plan "provides for fair geographical, racial and partisan balance throughout the State of North Carolina," J.A. 221, at the very most the statement establishes that he and the others considered *each* of those factors.[12] That provides no basis whatsoever for an inference that race predominated over the other factors, *see* State Br. at 38, and appellees do not even attempt to suggest any such basis. Instead they point to statements by *other* individual legislators referring to the racial balance of the plan (without further explanation), Appellees' Br. at 40, statements on which – once again – the district court did not rely.[13]

if the "incumbency [protection] elements" of the plan are put to one side, the plan is still "racially fair" even though it is not majority-minority because a minority "will have a fair chance of being elected." J.A. 471. The point being made is that while the district is less "racially fair" than it would have been had the State been predominately motivated by race, it is not *unfair* to minority voters and candidates. In the colloquy McMahan is also careful to caution his questioner that race "can only be a factor – along with other factors – and that's what we've tried to do." J.A. 470-71.

[12] Appellees assert that the district court "found that Appellents' *key witnesses* were 'not credible' and 'not reliable,'" and that these findings "suffice[] . . . to support the inference in this case that *the Appellants* had a predominant racial motive they were trying to conceal." Appellees' Br. at 11 n.12 (emphasis added) (citing *Reeves*, 120 S. Ct. at 2108). But the district court did not find that the State's "key witnesses" or "the Appellants" were not credible; it rejected only the testimony of Senator Cooper. And the only evident basis for rejecting his testimony was the court's conclusion that it could not be reconciled with the statistical evidence, a conclusion that, as we have seen, is insupportable.

[13] Appellees also rely on the testimony of several individual legislators, who testified at trial as to their view that the race predominately motivated the General Assembly's enactment of the 1997 plan. Appellees' Br. at 45-47. But none of these legislators was involved in any way in the drafting process, and such evidence was incompetent testimony as

IV. APPELLEES' CHALLENGE TO DISTRICT 12 IS BARRED BY ESTABLISHED PRINCIPLES OF CLAIM PRECLUSION

Appellees contend that none of the three elements of claim preclusion exist here. *See* Appellees' Br. at 53-54. Appellees are wrong at every turn.

1. The judgment of the *Shaw* court is indisputably a final judgment on the merits for preclusion purposes. The relevant question is whether that judgment encompassed the "same claim" as this subsequent suit.

2. The answer to that question is yes, because the current action raises "issues that were or could have been raised" in the prior proceeding. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981). The *Shaw* plaintiffs had the opportunity to raise any argument that the 1997 Plan failed to "cure the constitutional defects in the former plan" with respect to District 12. *Shaw v. Hunt*, CA No. 92-202-CIV-5-BR, Order (E.D.N.C. June 9, 1997). This action involves exactly that issue – *viz.*, whether District 12 in the 1997 Plan remains unconstitutional – and so necessarily implicates the "same claim" for preclusion purposes. If it does not, plaintiffs in any redistricting challenge could stand silent when specifically given an opportunity to raise constitutional objections to a new districting plan remedy, and then promptly file suit in a subsequent action alleging that the revised plan is unconstitutional. That is precisely the sort of outcome claim preclusion principles are intended to prevent.[14]

3. Finally, appellees submit that preclusion requires identity of the parties. This Court, however, has repeatedly acknowledged that claim preclusion applies not only to the same parties but extends to their "privies." *See, e.g., Moitie*, 452 U.S. at 398. The question here, then, is whether the two sets of plaintiffs are in privity. As we explained in detail in our opening brief, counsel's representation of both sets of plaintiffs, the concomitant coordinated and tactical maneuvering and forum-shopping, the closely aligned interests and overlapping participation of the plaintiffs in the two cases, and the "fence-sitting" implications of a public law issue of the sort implicated by this action, all combine to establish privity here. *See* State Br. at 48-49. Otherwise, a party could essentially game the system by lining up one plaintiff after another to raise successive challenges to any govern-

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to the state of mind of those who were; it is likely for these reasons that the district court disregarded such testimony in making its findings.

Similarly, appellees press on appeal their inevitable argument that District 12 is unconstitutional because it is "tainted" by the previous unconstitutional District 12 in the 1992 Plan. Appellees' Br. at 41-45. Even putting the significant differences in appearance between the two districts to one side, the dispositive point is that the district court in this case explicitly rejected appellees' argument, holding that "[a] comparison of the 1992 District 12 and the present District is of limited value here." J.S. 24a. Appellees also raised this same argument in the earlier summary judgment appeal before this Court, but the Court's opinion in that appeal did not even mention any "taint" remaining from the earlier District 12 as relevant evidence on appellees' side of the question.

[14] Appellees argue that the two proceedings cannot involve the same claim because the *Shaw* plaintiffs lacked Article III standing to file a separate lawsuit challenging the revised District 12 as a racial gerrymander. *See* Appellees' Br. at 54. But the *Shaw* plaintiffs *did* have standing to address the remedial adequacy of the 1997 Plan in the *Shaw* litigation itself, including whether the 1997 Plan eliminated District 12's unconstitutional aspects. *See* J.S. 319a (any "lack of standing on their part to challenge the constitutionality of that particular configuration of districts cannot affect our retained jurisdiction to review the plan for its adequacy to remedy the violation found as to former District 12"). In addition, even if the first court erred as to its subject-matter jurisdiction over plaintiffs' objections – and further assuming that plaintiffs only had standing to make such objections to the extent they would have had standing to file a separate complaint – such an error does not undermine the preclusive effect of its judgment. *See* 18 James W. Moore et al., Moore's Federal Practice ¶ 131.21[3][a], at 131-44 to 131-45 (3d ed. 1997); 18 C. Wright et al., Federal Practice and Procedure § 4428, at 272 (1981).

mental action in different courts until one challenge finally succeeded in obtaining the desired injunctive relief.

* * * *

This case presents itself on the eve of the next round of electoral redistricting by the States. If the district court's finding of racial predominance is affirmed on the facts in this record, States will be loathe to draw partisan districts where race and voting behavior correspond. They will understandably fear that the boundary correlation with partisan voting may turn out to be insufficiently "precise" to ward off costly federal-court litigation. Reversal of the judgment below, on the other hand, would not undermine the limits *Shaw* imposes on redistricting behavior. Cases like *Miller*, *Bush*, and *Hunt* have established clear and effective guideposts for evaluating *Shaw* challenges. Where, for example, a State repeatedly (and inexplicably) includes precincts that have numerous minority voters but that also make the district less partisan (as the State did in *Bush*, 517 U.S. at 971), or where a State repeatedly (and inexplicably) excludes non-minority precincts that are more partisan than precincts included, or where the direct evidence clearly demonstrates that the State Legislature enacted the redistricting statute with lines drawn for predominantly racial reasons, a challenge will succeed. No such showings have been made in this case.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the judgment should be reversed.

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FOOTNOTE 25 ALTERNATE GUILFORD COUNTY PRECINCTS LEGEND

- County Lines
- Precinct Lines
- District Line
- Precincts moved into District 12
- Precincts moved out of District 12